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No. 374

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Supreme Court of the United States

OCTOBER TERM, 1947

BOB-LO EXCURSION COMPANY,
Appellant

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee

Appeal from the Supreme Court of the State of Michigan

BRIEF FOR THE STATE OF MICHIGAN, APPELLEE

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FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN
1947

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BRIEF FOR THE STATE OF MICHIGAN, APPELLEE

I

Opinion Below [*]

The opinion of the court below (36), as appellant's counsel correctly states, is officially reported as *People of the State of Michigan v. Bob-Lo Excursion Company*, 317 Mich. 668, while the opinion of the court of first instance appears in the printed transcript of record (15).

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[*] Unless otherwise plainly indicated, numbers in parentheses throughout this brief refer to pages of the printed transcript of record.

II

Jurisdiction

We accept the statement of jurisdiction prepared by appellant's counsel.

III

Concise Statement of the Case

We trust the following additions to appellant's statement of the case, which is otherwise acceptable, will clarify the factual setting of this controversy:

1. The appellant corporation was organized under the laws of the State of Michigan[1] to engage in the business indicated by counsel in his brief, but incident thereto it is also authorized to acquire, own, hold and sell real and personal property in that state (5), and in 1945, when the case was tried, it had accepted from Michigan a beer and wine liquor license[2] in order that it might sell that commodity on its evening trips (11).[3]

The Detroit dockage facilities of the company, which it owns in fee, are located on the west side of Woodward avenue, and its vessels load there, after tickets have been

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[1] Michigan General Corporation Act: Mich. Stat. Ann. § 21.1 et seq.

[2] Act No. 8, § 24, Mich. Pub. Acts 1933, Ex. Sess.: Stat. Ann. § 18.995.

[3] The Wilson Act, 27 U.S.C. 121.

sold from booths (6) and taken up before the passengers board the boat, and 'it is taken for granted those on board have deposited a ticket' (10).

2. The boat company is in the business of transporting people to Bob-Lo and return[4] and providing recreation for them on the island (11); and while Bois Blanc Island,[5] which is owned by appellant in fee, forms part of Ontario, Canada (11), and though passengers who land there are subject to Canadian customs and immigration inspection (8), there are no means of transportation for them to the Canadian mainland at or near Amherstburg (11).[6]

3. Company policy to exclude negroes from their boats and the island had been in vogue for 21 years prior to 1945 and may have been prior to that. The assistant general manager testified (10) he knew of no occasion where a negro got passage to Bob-Lo; such a policy (he said) was to insure the continued success of the enterprise (11). As this witness phrased it (8), 'the defendant (appellant) adopted the policy of excluding so-called "Zoot-suiters", the rowdyish, the rough and the boisterous and it also adopted the policy of excluding colored' persons.

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[4] The fair inference to be gathered from the entire record is, we think, that such a return trip must be made the same day, for there is no evidence of over-night accommodations on the island.

[5] The term 'Bob-Lo', which has been locally resented, is a metropolitan corruption of 'Bois Blanc', the name given the island by the early French settlers.

[6] A further permissible inference is that such transportation is forbidden by the Canadian authorities.

4. While that policy continued in force during the summer season of 1945, the following incident occurred:

Sarah Elizabeth Ray, a resident of Detroit for 10 years, employed by the Detroit Ordnance District since May 1945, together with 40 other girls who were classmates in Commerce High School, planned to take a trip to Bois Blanc Island on June 21st under sponsorship of the Ordnance District which conducted a class in that school (3)[7]

On the morning of June 21st only 13 girls showed up at the foot of Woodward avenue in furtherance of such plans; Miss Ray was the only colored girl among them, the others being white (3).

Upon arrival at the appellant's dock, each of these girls paid 85 cents to Phyllis Walton, one of the group, who then purchased return tickets from Detroit to Bois Blanc Island and distributed them among the others;[8] whereupon the 12 white girls and the one colored girl passed through a gate, surrendered their tickets to the official in charge who

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[7]

The record is not clear as to the age of the complaining witness or other members of the group, but the implication is that they were employed in war work by the ordnance district, and that they attended a class organized for their benefit by the commerce school. At least that is the impression we gain after reading Miss Ray's testimony (3-5).

[8]

Bois Blanc Island, to which this colored girl purchased a return ticket, lies across a narrow channel of the Detroit River from the historic town of Amherstburg, a Canadian community not far from the scene of the Battle of Lake Erie. Fort Malden was built here in 1796, and at the close of the War of 1812 it was held by the Americans. Columbia Encyclopedia, 1940 Ed., p. 60. According to tradition, Amherstburg, was one of the termini of the Underground Railroad prior to the War between the States, and many negro slaves fled there for freedom.

accepted them, checked their coats on the boat (3), and went up on the top deck of the Steamer Columbia to sit down (4).

Shortly thereafter the group was approached by the assistant general manager of the company and the boat's stewart (4); Miss Reed, the girls' teacher asked them what they wanted; they in turn inquired if she knew the Ray girl; they said Miss Ray could not go along with the girls because she was colored, and, when the Ray girl told her teacher they were discriminating against her, both men got angry and told her she would have to get off the boat. One of the men then called to three white men in white uniforms, who were waiters in the restaurant, and told them to 'throw this woman off, and they all closed in on her and got excited; whereupon, the colored girl told them she would leave the boat. While she was being led off the vessel, the men told her she didn't have any right on the boat because it was a private concern, and they could keep her off if they wanted to (4).

IV

Summary of the Argument

1. We are in full accord with the opinion of the court below, 317 Mich. 691, that in view of the holdings of this Court in the cases here cited,[9], the defendant is engaged in foreign commerce', though we are also of the thought that certain outstanding facts related in the foregoing

[9]
Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1, 190-195;
Lord v. Steamship Co., 102 U.S. 541.

statement of the case,[10] indicate that appellant's "foreign commerce, is technical rather than substantial and that such facts bear directly and with considerable force upon the question 'whether the cited Michigan civil rights statute imposes an *unreasonable* (or *undue*) burden on foreign commerce'.

2. The Michigan Civil Rights Act, [11] which *inter alia* entitles all persons 'to full and equal accommodations, advantages, facilities and privileges . . public conveyances on land and water', is ancilliary rather than antagonistic to the spirit of § 1 of the Fourteenth Amendment; it is in step with the Federal Civil Rights Act, R.S. § 1977, 8, U.S.C. 41; and it is in perfect harmony and accord with the policy of the Congress exemplified in 'the sweeping prohibitions of the Federal Interstate Commerce Act, § 3, par 1, 49 U.S.

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[10]

That appellant's foreign commerce is confined to one-day-limit return pleasure trip by boat from a Michigan port to an Ontario island owned by the appellant in fee; that appellant is organized as a corporation under the laws of the State of Michigan; that its dock facilities in Detroit are under police and fire protection; that all ticket transactions occur in Michigan; these are facts which, among others, indicate what a light burden (if any) is cast upon the commerce by the Michigan Civil Rights Act.

[11]

Mich. Penal Code, § § 146-148, as amended by Act No. 117, Mich. Pub. Acts 1937; Mich. Comp. Laws Supp. 1940 § § 17115-146—17115-148; Mich. Stat. Ann. 1946 Cum. Supp. § § 28.343—28.346. It is historically significant that these sections of the Penal Code reenacted Act No. 130, Mich. Pub. Acts 1885, apparently in answer to The Civil Rights Cases (1883), 109 U.S. 3.

§ 3', [12] as construed and applied by this Court, *Mitchell v. United States*, 313 U.S. 80; it is, therefore, a permissible exertion of the State's *general* police power which in this particular instance at least, 'is of more importance than the federal government's *specific* police power in the absence of specific action by Congress';[13] hence, for the several reasons aforesaid, and because it does not restrict, restrain, limit, strangle, curb, or impede the flow of commerce,[14] the Michigan Civil Rights Act, in forbidding the appellant to deny its facilities and accommodations to colored persons solely on account of their race, cannot be said to place on foreign commerce an *undue* or *unreasonable* burden.

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[12]

"Paragraph 1 of § 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever'. 49 U.S.C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race". Mr. Chief Justice Hughes in Mitchell v. United States, 313 U.S. 91, 95.

[13]

Willis on Constitutional Law (1936), pp. 328-331. The author observes, among other things, that 'in the last few decades the Supreme Court has been permitting the states to exercise many forms of social control which indirectly or incidentally affect interstate commerce, when the states in doing so are undertaking to protect some of the general social interests of the people of the state, even where the interstate commerce is a matter of national concern and the federal government's power is regarded as exclusive'.

[14]

Cf. the Virginia statute declared unconstitutional by this Court in Morgan v. Virginia, 328 U.S. 373, and which declared a social policy directly opposed to that exemplified in the Michigan Civil Rights Act. See, also, Rice v. Santa Fe Elevator Corporation, 331 U.S. 218.

3. We do not, of course, agree with counsel's comments upon the opinion below.

V

The Argument

Historical Background of Michigan Act:

It might prove helpful, we thing, first to recall a few of those well-known historical events that led to the enactment of Michigan's Civil Rights Act (Act No. 130, Pub. Acts 1885), and thus place in true perspective the case on which counsel for appellant so strongly relies.

Hall. v. DeCuir, (1877), 95 U.S. 485.

> "Civil Rights legislation made its first appearance shortly after the close of the civil war. . . . As might be expected, however, the greatest impulse in these early days came from the reconstructionists who had taken over the state governments in the south. Thus the State of Louisiana had an 'equal rights' provision in its constitution of 1868."[15]

On Feb. 23, 1869, the Louisiana General Assembly enacted a law, La. Acts of 1869, p. 37, Rev. Stat. La. 1870, p. 93, which is interpreted by her highest court requiring all passengers, irrespective of color, to have equal privileges. And in 1877 this Court in the case of *DeCuir, supra,*

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[15]

May 1947 Iowa Law Review, Vol. 32, No. 4, article entitled: 'Exclusion, Ejection, and Segregation of Theater Patrons', sub-title, "(1) Civil Rights Statutes', p. 631 et seq. We are indebted to this and other law review articles for much of this preliminary material.

held such legislation to be a regulation of interstate commerce, a direct burden thereon, and therefore void.[16],

> "The climax to the movement for civil rights legislation in this period came with the enactment of the Civil Rights Bill of 1875 (18 Stat. 335 [1875] by the Congress. This statute was the most elaborate legislation yet adopted anywhere. Phrased positively, it sought to insure 'the full and equal enjoyment' of the accommodations, advantages, facilities, and privileges of inns, public conveyances, theaters, and other places of public amusement; subject only to the conditions established by law and applicable alike to citizens of every race and color."[17]

In 1883, however, this Court, in the

Civil Rights Cases (1883), 109 U.S. 3,

held the first and second sections of that law unconstitu-

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[16]

Mr. Justice North, who wrote for the court below, gave careful consideration, 317 Mich. 692-694, to the various decisions upon which appellant relied, particularly Hall v. DeCuir, and he succeeded, we submit, in drawing many valid distinctions between DeCuir and the case at bar. There is little we can add thereto unless it be to invite the Court's attention to a circumstance which cannot be overemphasized: that in the last few decades this Court has been permitting the States 'to exercise many forms of social control which indirectly or incidentally affect interstate commerce, when the States in so doing are undertaking to protect the general social interests of the people of the state'. Willis on Constitutional Law, p. 328.

[17]

May 1947 Iowa Law Review, p. 632. See also 43 Am. Law Review, p. 547, for article on 'Race Distinctions in American Law', and treating more particularly of 'The Civil Rights of Negroes', by Gilbert Thomas Stephenson.

tional as applied to the several states, not being authorized either by the 13th or 14th Amendments of the Constitution.

The foregoing historic decision of this Court rested on two principles:[18] (1) that the 14th Amendment nullifies all state legislation, and state action impairing privileges of citizens or injuring them in life, liberty or property without due process of law, or denying equal protection of laws; and (2) that the 14th Amendment was designed to prohibit state invasion of equal civil rights, and to authorize Congress to adopt appropriate legislation for correcting effects of prohibited state laws, but not to authorize enactment of laws for the equal protection of civil rights. And it has resulted in leaving much, if not all, of such social legislation to the States' domain.'

In 1885, then, Michigan entered the vanguard of those States whose legislatures enacted laws designed to protect large segments of their population from unjust consequences of racial discrimination. Act No. 130, Pub. Acts of Mich. 1885 was enacted 'to protect all citizens in their civil rights.'[19]

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[18] As phrased in Rose's Notes, Vol. 12, pp. 105, 106.

[19] The Michigan Supreme Court in an early case, Ferguson v. Gies, (1890), 82 Mich. 358, 365, held this statute to be declaratory of the common law under which the colored man 'was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there'. And for other Michigan statutes prohibiting discrimination by schools, see § § 15.76, subd. (1); 15.380; validating prior inter-racial marriages, § 25.6; and prohibiting life insurance companies from discriminating, § 24.293, all citations being Mich. Stat. Ann.

In 1931 the Michigan legislature passed the Penal Code of that State, Act No. 328, Pub. Acts 1931, and reenacted the State Civil Rights Act as § § 146-148 thereof, Comp. Laws 1940 Supp. § § 17115-146-17115-148, Stat. Ann. § § 28.343-28.345.

And in 1937 the foregoing sections of the Penal Code were amended, Act No. 117, Pub. Acts 1937, to extend their range. For full text, see Appendix A.

Questions Presented:

Two questions arise: (1) whether the Michigan Civil Rights Act, as applied to appellant's excursion business, places on such foreign commerce an undue, unreasonable, and therefore an unconstitutional burden in violation of the Commerce Clause; and (2) whether the Act so interferes with the exclusive jurisdiction of Congress over foreign commerce as to render it invalid as applied to appellant.

1

The Michigan Civil Rights Act, as applied to appellant's excursion business, imposes on foreign commerce no undue or unreasonable burden.

In *Morgan v. Virginia*, 328 U.S. 373, this Court considered provisions of a Virginia statute which required the *separation* of white and colored passengers on both interstate and intrastate motor carriers, and held them invalid as applied to interstate passengers in vehicles moving interstate, because they burdened interstate commerce, even though Congress has enacted no legislation on the subject.

The Court, through Mr. Justice Reed, appraised (p. 381) 'the *weight* of the Virginia statute on interstate commerce', and in so doing noted that the factual situation 'emphasizes the soundness of this Court's early conclusion in *Hall v. DeCuir*, 95 U.S. 485', and said:

> "As our previous discussion demonstrates, the transportation difficulties arising from a statute that requires *commingling* of the races, as in the *DeCuir* case, are increased by one that requires *separation*, as here". [Emphasis supplied].

The opinion of the Court in *Morgan* rests on the principle that 'state legislation is invalid if it *unduly* burden's interstate commerce where uniformity is necessary in the consitutional sense of useful in accomplishing a permitted purpose' (Syl. 4), and upon the fact that confusion would result from a diversity of state laws governing the same interstate transportation transactions. Or, as Mr. Justice Frankfurter expressed it in his concurring opinion, p. 388, 'The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce *unreasonably*, whether such contradictory and confusing State laws concern racial *commingling* or racial *segregation*'.

The Court, p. 384, quoting in note 29 from the opinion of Mr. Chief Justice Waite in *DeCuir*, at p. 489, indicates the reasons for such a rule as applied to interstate commerce:

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense,

and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion like to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate".

Merely to read the foregoing quickly demonstrates the inapplicability of such principles to the Michigan Act as applied to the 'foreign commerce' of the Bob-Lo Excursion Company.

1. In the foreign commerce presently involved, such as it is, absent a treaty between Canada and the United States, there can be no uniformity of law (though within this particular field there appears not the slightest possibility of conflict, for one cannot imagine the Canadian Parliament enacting a statute requiring the *segregation* of colored passengers on Bob-Lo boats or *forbidding* their transportation).

2. The 'foreign commerce' which in a technical sense is carried by appellant's vessels is all but infinitesimal. While its passengers are transported from an American port to a Canadian Island, their stay in the Dominion is limited to a few hours of recreation; they do not journey abroad for any commercial purpose; and, so far as each patron is concerned, he might just as well be going to one of many American islands at the mouth of the Detroit River.

Moreover, the Bob-Lo Excursion Company is a Michigan corporation doing business under protection of Michigan laws, and its property in Detroit, its docks and buildings, its vessels while at the wharf, all are subject to police protection furnished by the State.

Appellant's vessels carry no freight; they transport no Canadian passengers to the United States (unless through happenstance); and they take little part in the flow of commerce between the two countries.

It therefore becomes clearly apparent that all of the appellant's business transactions are with Michigan residents (unless one takes into account the occasional out-state visitor to Michigan).

What burden is there on such commerce? Is it 'undue or unreasonable' or both? And how can it be said that Michigan's Civil Rights Act, when applied to appellant's business, in any manner impedes, obstructs, restricts, or curbs the flow of commerce between the United States and the Dominion of Canada?

We, therefore, respectfully submit that the Act in question here, as applied to appellant, imposes on foreign commerce no undue or unreasonable burden.

2.

The Michigan Civil Rights Act, as applied to appellant, does not so interfere with the exclusive jurisdiction of Congress over foreign commerce as to render it invalid.

As long ago as 1890, the court below, when applying Michigan's Civil Rights Act of 1885, found the policy of this State to be that 'any discrimination founded upon the race or color of the citizen is unjust and cruel, and can have no sanction in the law of this state'. *Ferguson v. Gies*, 82 Mich. 358, at 365. And that policy, so declared, has never been abandoned.

In 1895, our court held that 'a state may enact laws for the protection of the health, lives, and property of its people in respect to those subjects over which Congress has the power to legislate, and such laws are valid and may be enforced so long as they do not conflict with Federal legislation'.

Burrows v. Delta Transportation Co., 106 Mich. 582.

This latter opinion in *Burrows v. Delta Transportation Co.*, is in harmony with recent decisions of this Court:

Terminal Railroad Association v. Trainmen, 318 U.S. 1, holding in the absence of federal legislation which conflicts or occupies the field, it is within the authority of a State, in the interest of health and safety of employees, to require a terminal railroad, though engaged largely in interstate commerce, to provide cabooses on trains within the State on designated runs;

Cf.

Southern Pacific Co. v. Arizona, 325 U.S. 761.

Although the Illinois law drawn in question in the *Terminal Association* case required the appellant to provide cabooses on trains '*within* the state', and while the Arizona law considered invalid by this Court in the *Southern Pacific* case seemed to apply only intrastate (though it was held to affect interstate commerce), we are persuaded that the principles announced for the Court by Mr. Justice Jackson and the late Mr. Chief Justice Stone, are applicable here.

We, therefore, renew the suggestions made in our summary of the argument:

1. It is conceded in appellant's brief, p. 15, that Congress has not acted to regulate within this particular field; and, we respectfully submit, there is no federal legislation which conflicts with the Michigan Civil Rights Act.

2. The Michigan Act is in spirit and principle ancillary rather than antagonistic to the first section of the Fourteenth Amendment, though we must admit this *alone* would not save the statute if it violates the Commerce Clause.

3. We repeat: the Michigan law is in step with the Federal Civil Rights Act, R.S. § 1977, 8 U.S.C. 41, and it is in harmony with the public policy of this Nation as declared by the Congress in the Interstate Commerce Act, § 3, par. 1, 49 U.S.C. § 3, as construed and applied by this Court,

Mitchell v. United States, 313, U.S. 80.

We, therefore, respectfully submit that since Congress has not acted to protect the colored citizens of Michigan from the racial discrimination practiced by the Bob-Lo

Excursion Company, since the Michigan Act does afford such protection, and since enforcement of the local law leads to no confusion in foreign commerce, the Michigan Civil Rights Act should be upheld as constitutional. In short, until Congress sees fit to occupy the field, the class of citizens affected by the policy of the Bob-Lo Excursion Company should not be left to occupy the No-man's Land which appellant in this case urges the Court to mark out.

VI

Conclusion

It is respectfully submitted the judgment of the Supreme Court of the State of Michigan should be ~~reversed~~ affirmed

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